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No. 85-509

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANTHONY J. SESTRIC,

Petitioner,

vs.

WILLIAM G. CLARK, JOSEPH H. GOLDENHERSH, THOMAS J. MORAN, HOWARD C. RYAN, SEYMOUR SIMON, BEN MILLER, and DANIEL P. WARD, Judges of and Constituting the Supreme Court of the State of Illinois,

LEN YOUNG SMITH, DONALD H. FUNK, GEORGE B. LEE, FRANCIS D. MORRISSEY, and STUART DUHL, Members of and Constituting the State Board of Law Examiners of the State of Illinois,

Respondents.

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the privileges and immunities clause requires states to waive the bar examination requirement for non-resident attorneys seeking reciprocity.

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ARGUMENT

THE PRIVILEGES AND IMMUNITIES CLAUSE DOES NOT REQUIRE STATES TO WAIVE THE BAR EXAMINATION REQUIREMENT FOR NON-RESIDENT ATTORNEYS SEEKING RECIPROCITY.

Illinois does not discriminate on the basis of residence with respect to individuals who wish to take the Illinois bar examination—both residents and non-residents alike

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* Justice Robert C. Underwood has been succeeded in office by Justice Ben Miller, whose name is being substituted pursuant to F.R.A.P. 43(c)(1).

generally must take the bar to obtain a license to practice law in this State. *See* Illinois Supreme Court Rule 704. Under specified circumstances, however, the State will waive this requirement for licensed attorneys from other jurisdictions who wish to relocate to Illinois. Assuming that these individuals qualify under Illinois Supreme Court Rule 705, they will not be required to take this state's bar examination in order to be licensed here. This case presents the question of whether such an exemption is constitutional under the privileges and immunities clause.

A license to practice law has no extraterritorial effect and vests no right in the holder to practice law in any jurisdiction other than the one which licensed him. *Cohen v. Hurley*, 366 U.S. 117, 123 (1961), *reh. den.*, 374 U.S. 857 (1963). Admission to practice law in a state and before its courts is "primarily a matter of state concern." *Martin-Trigona v. Underwood*, 529 F.2d 33, 35 (7th Cir. 1975). States have a constitutionally permissible and substantial interest in regulating bar admission, *In re Griffiths*, 413 U.S. 717, 723 (1973), so each has the right to establish its own rules regarding the qualifications necessary for the practice of law within that particular jurisdiction. *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 159-60 (1971); *Sperry v. Florida*, 373 U.S. 379, 383 (1983). Therefore, each state can require high standards of qualification before admitting applicants to the bar. *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 238 (1957).

The exercise by a state of the power to regulate the practice of law within its jurisdiction allows it to require any applicant, whether resident or migrant, to demonstrate proficiency in the law as a prerequisite to receiving a license to practice. Accordingly, each state has the

unquestionable right to require every applicant for a law license to take the bar examination. *See*, e.g., *O'Neal v. Thompson*, 559 F.2d 485 (9th Cir. 1977); *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), *reh. den.*, 521 F.2d 815, *cert. den.*, 426 U.S. 940 (1976); *Whitfield v. Ill. Bd. of Law Examiners*, 504 F.2d 474, 476-77 (7th Cir. 1974); *Feldman v. State Bd. of Law Examiners*, 438 F.2d 699, 705 (8th Cir. 1971); *Chaney v. State Bar of California*, 386 F.2d 962 (9th Cir. 1967), *cert. den.*, 390 U.S. 1011, *reh. den.*, 391 U.S. 929 (1968).

Recognizing that a bar examination requirement in every state substantially decreases the mobility of attorneys by discouraging them from relocating, many states, like Illinois, have adopted some form of reciprocity to allow experienced attorneys to move to another state without having to re-take the bar examination. *See* "Summary of State Rules on Admission by Reciprocity," in Hafter, *Toward the Multistate Practice of Law Through Admission by Reciprocity*, 53 Miss. Law J. 1, 44-47 (1983) ("Hafter"), reprinted at App. 1 to 4. Such reciprocal legislation is not unique to this field, moreover, since states frequently effect interstate agreements to their mutual benefit by utilizing reciprocal legislation.

In *New York v. O'Neal*, 359 U.S. 1 (1959), this Court upheld the Uniform Law to Secure the Attendance of Witnesses from Within or Without the State in Criminal Proceedings against a challenge that it violated the compact clause of the Constitution, stressing that the Constitution,

> * * * is not to be construed to limit the variety of arrangements which are possible through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the constitution. Far from being divisive, this legislation is a catalyst of cohesion. * * *

359 U.S. at 6. Reciprocal legislation is frequently utilized not only in the field of professional licensing, but also in the fields of taxation and licensing fees, *Blue Arrow Douglas, Inc. v. Howlett*, 54 Ill. App. 3d 230, 369 N.E.2d 272 (1st Dist. 1977); *Angevine v. Comm'r of Corps. and Taxation*, 281 N.E.2d 583 (Mass. 1972), as well as in diverse other areas. *See*, e.g., Uniform Arbitration Act, Ill. Rev. Stat. 1983, ch. 10, ¶ 101 *et seq.*; Uniform Attendance of Witnesses Act, Ill. Rev. Stat. 1983, ch. 38, ¶ 156-1; Uniform Child Custody Jurisdiction Act, Ill. Rev. Stat. 1983, ch. 40, ¶ 2101 *et seq.* Indeed, Illinois alone has thirty-seven reciprocal laws, excluding the one under consideration here. Each of these laws is an example of what can be achieved through fostering cooperative interstate relationships. Ironically, plaintiff in the instant case seeks to invalidate reciprocity in the area of attorney licensing under the privileges and immunities clause of Article IV, § 2 of the United States Constitution.

Reciprocal legislation should never be invalidated under the privileges and immunities clause because it is completely consistent with the spirit and purpose of that clause. Historically, the privileges and immunities clause was not isolated from the commerce clause. In the Articles of Confederation, where both clauses have their source, the two concepts were found together in the fourth Article, which was adopted "[t]he better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union . . . ." In *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869), this Court analyzed this clause and emphasized that

> . . . the privileges and immunities secured to the citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States

> under their constitution and laws by virtue of their being citizens. * * * It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given.

75 U.S. at 180-81. Thus, the privileges and immunities clause was not designed to require nationalization of professional licensing requirements. Each state still has the right to require applicants for such licenses to satisfy state requirements, and each should be able to enter into reciprocal agreements with other states to waive those requirements under specified conditions without violating this clause.

In *Hawkins v. Moss*, 503 F.2d 1171 (4th Cir. 1974), *cert. den.*, 420 U.S. 928 (1975), an attorney challenged the constitutionality of a South Carolina Supreme Court rule allowing a bar examination exemption only to those attorneys admitted to practice in a state granting reciprocity to South Carolina attorneys. The Court in *Hawkins* explained that such laws are common in many states and they

> . . . represent a state's undertaking to secure for its citizens an advantage by offering that advantage to citizens of any other state on the condition that the other state make a similar grant. To secure for her citizens the reciprocal rights and advantages obtained under such statutes or rules is manifestly a legitimate interest and goal on the part of a state just as it is a legitimate interest of one nation to secure reciprocal property rights for its citizens in other nations. (footnotes omitted).

503 F.2d at 1176-77. The *Hawkins* Court rejected arguments that this reciprocal legislation violated equal pro-

tection or the privileges and immunities clause, or that it deprived individuals of their right to travel, because

> * * * [t]he right of federal citizenship . . . is not to be construed to mean that a citizen carries with him from state to state an absolute right of comity to practice, not a "common occupation", but a profession, which is properly subject to state regulation, in any state to which he travels * * * The State has a perfect constitutional right to require of the appellant that he demonstrate his proficiency in the law by an examination; that it exempts from that requirement some applicants for reciprocity reasons which serve a legitimate "substantial" or "important" state interest does not operate to relieve the appellant of so demonstrating his proficiency.

503 F.2d at 1178-79.

The preference under consideration here is not a durational residency requirement which penalizes non-residents and benefits residents by permitting the latter to practice law on the basis of their in-State residence. Rather, both residents and non-residents are generally subject to the same bar examination requirement. Preferential treatment is afforded only to non-residents who are migrating to the State to exempt them from this requirement under certain conditions. This exemption is not proscribed by the privileges and immunities clause, which was simply designed to prevent "a state from discriminating against citizens of other states in favor of its own." *Hague v. C.I.O.*, 307 U.S. 496, 511 (1939).

Thus, this Court's recent decision in *Supreme Court of New Hampshire v. Piper*, ____ U.S. ____, 105 S. Ct. 1272 (1985) has no application to the facts of the instant case, because *Piper* simply invalidated a discrimination in favor of State residents against non-residents with respect to their ability to practice law in New Hampshire. Since Illi-

nois residents applying for a law license do not enjoy an advantage over non-residents like the petitioner in this case, the holding in *Piper* is not applicable here.

In *In re Jadd*, 391 Mass. 227, 461 N.E.2d 760 (1984), the Massachusetts Supreme Court invalidated its own reciprocity rule under the privileges and immunities clause. After tracing in detail the numerous decisions invalidating residency requirements in order to qualify to practice law, the Court stated,

> The question remains whether there is any significant difference between residency requirements for admission by examination which, . . . have been consistently struck down on privileges and immunities grounds, and a residency requirement for admission to the bar on motion [without examination]. * * * Does the fact that an attorney admitted on motion need not take and pass our State's bar examination make a difference in an analysis of the validity of a residency requirement? We think it does not. * * *

461 N.E.2d at 765. The Massachusetts Supreme Court erroneously concluded that once it adopted a scheme whereby it agreed to admit experienced attorneys without examination, it could no longer rationally claim that the bar examination requirement is ". . . an essential means in assessing [an individual's] knowledge of local law or any other qualification for admission to the bar." 461 N.E.2d at 766. While it is true that this decision supports the arguments advanced by the petitioner in this case, the opinion is not well reasoned and should not be followed. A state can choose to provide a special reciprocal exemption to professional licensing requirements without conceding that the underlying requirement is meaningless. A state's willingness to provide a limited reciprocal exemption under certain circumstances does not operate to forfeit the State's right to impose an otherwise valid and

meaningful requirement. Rather, the reasoning employed by the Court in *Hawkins v. Moss, supra,* is the correct analysis to be applied in assessing the constitutionality of reciprocal legislation.

Substantial numbers of attorneys are licensed each year without taking bar examinations under reciprocity. *See* Hafter, 53 Miss. Law J. at 36, Table reprinted at App. 5. Since states are not required to license by reciprocity, a mandate that all out-of-state attorneys be eligible for reciprocity if it is extended to anyone could result in the repeal of such legislation in many states. This fact is acknowledged in Hafter, where the author opines that

> . . . the invalidation or repeal of residency requirements, now underway throughout the nation, does create the potential for a revolution in the availability and frequency of admissions by reciprocity. It is possible that the successful assault on the residency requirements may precipitate a wholesale repeal of admission by reciprocity. * * *

Hafter, 53 Mass. Law J. at 42.

It is well settled that each state can constitutionally require all bar applicants to pass an examination on their fitness to practice law. That some states have enacted a limited form of reciprocity in the interests of providing a certain degree of mobility to their licensed attorneys does not mean that they are in favor of a multi-state or national bar. Each of the states has the right to decide this issue separately; they cannot be coerced into providing for the admission of all out-of-state attorneys by the privileges and immunities clause. In this case the Seventh Circuit Court of Appeals correctly held that Supreme Court Rule 705 was constitutional and did not deprive non-residents of rights secured to them by the privileges and immunities clause.

CONCLUSION

For the foregoing reasons, the Respondents submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

TABLE 1

SUMMARY OF STATE RULES ON ADMISSION BY RECIPROCITY

State	SECTION 1			SECTION 2	SECTION 3	SECTION 4				SECTION 5
						Activities Constituting "Practice of Law"				
	Reciprocity Without Exam	Reciprocity With Special Exam	No Reciprocity	Years of Prior Practice Required[c]	Special Requirements	(1) Gov't Practice	(2) Judicial Service	(3) Law School Teaching	(4) Military Practice	Required Residence for Admission By Reciprocity
ALA.			X[b]							N/A
ALASKA		X		5 of 7	f		No Specific Definition			None[j]
ARIZ.			X							N/A
ARK.	X			3 of 4	g		No Specific Definition			Upon Application
CAL.		X		4 of 6			No Specific Definition			None
COLO.	X			18 of 25[d] 8 of 10	g	X		X	X	Upon Application
CONN.	X			5	h		No Specific Definition			6 Months Before Application
DEL.		X		5			No Specific Definition			Upon Examination
D.C.	X			5 of 8[e]		X	X			None
FLA.			X							N/A
GA.			X							N/A
HAWAII			X[b]							N/A
IDAHO		X		5 of 7			X	X		Upon Application
ILL.	X[a]			5 of 7	g, h		No Specific Definition			Upon Admission
IND.	X			5 of 7	g, h		X	X		Upon Application[q]
IOWA	X			5 of 7				X	X	Upon Application
KAN.	X			5			No Specific Definition			Upon Application
KY.	X			5 of 7				X		r
LA.			X							N/A

State	SECTION 1 Reciprocity Without Exam	SECTION 1 Reciprocity With Special Exam	SECTION 1 No Reciprocity	SECTION 2 Years of Prior Practice Required[c]	SECTION 3 Special Requirements	SECTION 4 Activities Constituting "Practice of Law" (1) Gov't Practice	(2) Judicial Service	(3) Law School Teaching	(4) Military Practice	SECTION 5 Required Residence for Admission By Reciprocity
ME.		X		3				X		Upon Application
MD.		X		5 of 7	f		X	X		None[n]
MASS.	X			5				X		Upon Application
MICH.	X			3 of 5				X	X	Upon Application
MINN.	X[a]			5 of 7	h	X	X	X	X	s
MISS.	X			5	g	X	X	X	X	6 Months Before Application
MO.	X			5		X		X		Upon Application[u]
MONT.	X[b]			2	g		No Specific Definition			6 Months Before Application
NEB.	X			5 of 10			No Specific Definition			None[p]
NEV			X[b]							N/A
N.H.			X							N/A
N.J.			X[b]							N/A
N.M.		X[b]		5			No Specific Definition			90 Days Before Admission
N.Y.	X			5		X		X	X	None[k t]
N.C.	X			3 of 5	g	X	X	X	X	60 Days Before Application
N.D.	X			4 of 5		X	X	X	X	Upon Application
OHIO	X			5	h			X		Upon Admission
OKLA.	X[b]			5	g		X	X	X	Upon Application
OR.		X[b]		3 of 5			No Specific Definition			Upon Admission

State	SECTION 1 Reciprocity Without Exam	SECTION 1 Reciprocity With Special Exam	SECTION 1 No Reciprocity	SECTION 2 Years of Prior Practice Required[c]	SECTION 3 Special Requirements	SECTION 4 Activities Constituting "Practice of Law" (1) Gov't Practice	(2) Judicial Service	(3) Law School Teaching	(4) Military Practice	SECTION 5 Required Residence for Admission By Reciprocity
PA.	X			5	g	X		X		t
R.I.	X			5 of 10	i			X		Upon Application
S.C.			X[b]							N/A
S.D.	X			5			X	X	X	None[n]
TENN.	X			5	g			X		Upon Application[u]
TEX.	X			3	f		X	X	X	3 Months Before Application[u]
UTAH	X			3 of 5	g		X	X	X	3 Months Before Application
VT.	X			5 of 10			No Specific Definition			6 Months Before Application[v]
VA.	X			5	g		No Specific Definition			Upon Application
WASH.			X							N/A
W. VA.	X[b]			5	f	X			X	None[m]
WIS.	X			3 of 5	h	X	X	X	X	Upon Application
WYO.	X			5 of 8			No Specific Definition			None[o]
TOTALS:	32	8	11							

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Chart's Footnotes

a Applicant must have passed multistate professional responsibility examination (MPRE).

b State makes provision for admission, without examination, for law professors at in-state law schools.

c Many states provide that the required years of practice in a former jurisdiction must be within a certain immediate preceding period; for instance, notation "5 of 6" indicates requirement that applicant must have practiced 5 of immediately preceding 6 years.

d Colorado permits admission without examination to attorneys with 18 years experience regardless of former state's requirements for admission but permits admission with 8 years experience if former state's requirements for admission are equal to Colorado.

e District of Columbia applies a lower practice requirement if the former jurisdiction requires less than 5 years practice.

f Alaska and Maryland require applicant to have passed a written bar examination in former state, therefore, attorneys admitted by diploma privilege do not qualify. Texas and West Virginia achieve the same result by requiring that the applicant must come from a state whose initial admission requirements are equal to the standards of those states.

g Admission without examination is available only to applicants from states that extend similar privileges to applicants from this state.

h Rules exclude admission by reciprocity of those who have previously failed this state's bar examination.

i Rhode Island has special provision for admission of attorneys admitted in other jurisdictions, without regard to time of practice, as long as they are employed by federally funded programs providing legal services to indigents.

j Alaska's residency requirements were held unconstitutional in Sheley v. Alaska Bar Ass'n, 620 P.2d 640, 645 (Alaska 1980) (30 days durational residency), and Noll v. Alaska Bar Ass'n, 649 P.2d 241, 242 (Alaska 1982) (simple residency).

k New York's six-month durational residency requirements were held unconstitutional in Gordon v. Committee on Character & Fitness, 48 N.Y.2d 266, 273, 422 N.Y.S.2d 641, 645, 397 N.E.2d 1309, 1312 (1979).

l South Dakota's requirement of simple residency upon application was held unconstitutional in Stelland v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155, 162 (D.S.D. 1982).

m West Virginia's 30-day durational residency requirement was held unconstitutional in Sargus v. West Virginia Bd. of Law Examiners, 294 S.E.2d 440, 446 (W. Va. 1980).

n Maryland repealed its requirement of residency upon application after it was challenged in Golden v. State Bd. of Law Examiners, 452 F. Supp. 1082, 1094 (D. Md. 1978), *appeal dismissed as moot*, 614 F.2d 943, 945 (4th Cir. 1980), and its requirement of residency upon admission after further challenge in Hayes v. Court of Appeals, Civil Action No. M-81-223 (D. Md.).

o Wisconsin repealed its requirement of simple residency upon application after it was challenged in Canfield v. Wisconsin Bd. of Attorneys Professional Competence, 490 F. Supp. 1286, 1290 (W.D. Wis. 1980), *vacated as moot*, 645 F.2d 76 (7th Cir. 1981).

p Nebraska repealed its requirement of simple residency upon application on March 24, 1982.

q In addition to residence, Indiana requires the applicant to file an affidavit of intent to establish a law practice in Indiana within two years of admission.

r Kentucky requires applicant either to be resident of Kentucky or intend to perform "the major portion" of professional activities in Kentucky.

s Minnesota requires applicant either to be resident of Minnesota or to maintain office in Minnesota, or to designate Clerk of Minnesota Supreme Court as his agent for service of process.

t New York and Pennsylvania require all attorneys either to establish a domicile or a fixed office in the state.

u Missouri, Tennessee, and Texas require residency either within the state or in limited areas immediately adjoining the state border.

v Vermont requires attorney to apply by reciprocity to study for 6 months in office of Vermont attorney.

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TABLE 2

	All Jurisdictions			
	Admissions By Examination	Admissions By Diploma Privilege	Admissions By Reciprocity*	Total Admissions
1975	34,144	786	2104	37,034
1976	34,951	790	2741	38,482
1977	36,463	839	2504	39,806
1978	38,319	767	2795	41,881
1979	41,903	853	3350	46,106
1980	41,105	892	3100	45,097
1981	41,442	940	2197	44,579
Total	268,327	5867	18,791	292,985
Percentage	91.6%	2.0%	6.4%	